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CASE NO. 87-232

IN THE

Supreme Court of the United States

October Term, 1987

MONY LEICHIHMAN,

Petitioner,

vs.

PICKWICK INTERNATIONAL, INC., AND AMERICAN CAN COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. May a trial court grant a new trial on the grounds that the jury verdict is against the weight of the evidence in a case in which the issues are not simple and the trial court has not specifically disregarded the jury's assessment of the credibility of the witnesses.

The Court of Appeals ruled in the affirmative.

II. May a trial court grant a new trial on the grounds that the verdict is against the weight of evidence when the trial court bases its ruling on the evidence.

The Court of Appeals ruled in the affirmative.

LIST OF PARTIES AND AFFILIATES

Petitioner: Petitioner Mr. Mony Leichihman is an individual.

Respondent was formerly known as Pickwick International, Inc. and is now correctly known as The Musicland Group, Inc., a publicly held corporation. The majority of The Musicland Group, Inc. stock is held by the former American Can Company which recently changed its name to Primerica Corporation.

Although Petitioner has named American Can Company as a Respondent, the trial court granted American Can Company's motion for summary judgment by Order dated August 17, 1983 and judgment was entered thereon in favor of American Can Company. No issues pertaining to American Can Company have been raised in Mr. Leichihman's petition.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 814 F.2d 1263 (8th Cir. 1987). The August 15, 1984 Memorandum and Order of the District Court for the District of Minnesota is reported at 589 F.Supp. 831 (D.Minn. 1984). Both opinions are included in Petitioner's Appendix.

STATEMENT OF THE CASE

Pickwick International, Inc. is now primarily known for its operation of the "Musicland" chain of record stores,[1] although at one time it had many divisions and affiliated companies, including, Pickwick Distribution (sales of records and tapes to non-owned music stores); Pickwick Rack (operation of record departments in discount and department stores); Pickwick Great Britain; Keel Manufacturing Co. (record pressing and manufacturing); Disc Graphics (record jacket printing and manufacturing); and other operations. In addition, Pickwick once operated up to 18 record warehouses across the country for shipping and receiving. In the 1970's the number of "Musicland"stores increased dramatically and the number of Pickwick employees in all divisions jumped into the several thousand range. Pickwick's growth during this period was phenomenal, and was fueled by a "charged" record buying atmosphere and the enormous success of several rock and pop musical groups. In 1977, American Can Company purchased all of Pickwick's stock and it became a wholly owned subsidiary of American Can Company.

In the late 1970's, in contrast to the earlier years, the record industry in general and Pickwick in particular began to lose vast amounts of money and suffered enormous financial setbacks due to a recession and a down-turn in the record industry. In the period from the late 1970's through the time of Petitioner's termination in 1981, Pickwick lost huge sums of money and in one period of approximately a year and a half, went from profits of many millions of dollars to a net loss of nearly $100,000,000.

Because Pickwick was a highly integrated company operating businesses in retail, wholesale, manufacturing and distribution, all running through one central management, purchasing and

[1]For purposes of clarity, the Respondent will be referred to herein as Pickwick.

accounting department, it was extremely difficult to determine where the company was losing money and where it was making money. To find the answers to these questions, it was decided to make each aspect of the company financially accountable, and in order to do so, management decided to split Pickwick into two totally independent companies with separate management and direction and operating from different locations. One company would operate the retail stores and the other would take over all Rack and Distribution functions. The two companies would be known as "The Musicland Group" and "Pickwick Rack". The financial situation was so desperate during this period, that the company also sold or closed Pickwick Great Britian, Keel Manufacturing Co., Disc Graphics and Pickwick Records and almost all of the warehouses. Hundreds of people were terminated across the country as each division was sold or closed. In addition, there were several mass layoffs in the home office which came to be known as "Black Fridays".

Petitioner was hired by Pickwick in 1966 and worked in the record return department in the Minneapolis warehouse. In 1978 he assumed the position of Returns Quality Control Manager. In Petitioner's early years, the company had a large returns department as the millions of unsold records returned to Pickwick each year from its customers were counted one-by-one by hand. As Returns Quality Control Manager, Petitioner would oversee the paperwork generated by the returns process and oversee the documents for completeness and accuracy. If there were discrepancies, he would track down the returns and try to find the errors. Once he was satisfied with the documents, he would transfer them to the credit adjustment department which would then issue a credit memo to the customer.

By 1981, a number of factors came into play which ultimately made Petitioner's position unnecessary. Until approximately 1980, all record manufacturers had had a policy of allowing 100% returns of unsold records from their distributors such as

Pickwick and Pickwick similarly accepted 100% returns from its customers. In 1980, however, the record manufacturers severely cut down on the number of records which could be returned and, accordingly, Pickwick cut down on the number of returns it would accept. This change in policy significantly reduced the number of records Petitioner's department had to process and also reduced the number of people working in returns. In addition, Pickwick conducted studies which showed that, over the long run, it was not necessary to count returned product as there was very little, if any, discrepancy between the amount of credit claimed by Pickwick's customers and the actual value of the returned product so that it was not worth the time and expense of counting returns or examining the paperwork. Additionally, the recession and down-turn of the record business in general substantially reduced the number of records coming back to the warehouse.

As part of the planning to implement the reorganization mentioned above, it was decided that the new Pickwick Rack would streamline its records return department and would not count records or analyze the paperwork, but would merely send the credit request forms to the credit adjustment department, although occasionally they would make a random check to verify that the claimed credits were within a tolerable range. Once this decision was made, there was no need for someone to do peitioners work in the new Rack company and when the split was made he was assigned to The Musicland Group.

In 1981, the company was still in difficult financial condition and several companywide task forces were set up to identify areas of potential cost reduction. In the spring of 1981, following an investigation which lasted several months, one task force recommended, among other things the elimination of several jobs including Petitioner's. The task force had recognized that due to the decrease in the number of returns, the use of spot checking rather than hand counting, automation already in

place and anticipated computerization of returns, Petitioner's position was no longer necessary. At trial, Petitioner readily agreed that his position in The Musicland Group's returns department was no longer necessary and he could not quarrel with the decision to eliminate his function. Although hundreds of people had lost their jobs in the bad times and the lay-offs, Petitioner's position went untouched until the spring of 1981 when the task force determined that his job was no longer necessary.

Petitioner commenced this action alleging multiple claims for relief including (1) federal age, national origin and religious discrimination, (2) state age, national origin and religious discremination, (3) breach of contract, (4) conspiracy, (5) retaliatory discharge and (6) tortious interference with contract, against both Pickwick and American Can Company. Discovery lasted over 18 months and resulted in the production of thousands of documents. Depositions were taken of 20 witnesses and Petitioner's own deposition took place over the course of several days and was close to one thousand pages. Petitioner not only claimed that Pickwick committed all of the alleged illegal acts relating to his termination in 1981, but also claimed discriminatory acts over a three to five year period including his promotion to Returns Quality Control Manager and his belief that Pickwick's executives were corrupt, dishonest and incompetent and that they conspired against him because he "knew too much".

Even after American Can Company and Pickwick were successful in obtaining partial summary judgements, Petitioner persisted in claiming national origin and religious discrimination until the very first day of trial when he voluntarily dismissed these claims, even though a significant part of pretrial discovery had been devoted to defending these allegations.

Trial lasted almost two weeks and over a dozen witnesses testified on all aspects of the case, including expert testimony on

statistics, labor, employment, medicine and psychiatry. A significant portion of the trial was devoted to the science of statistics and probability theory with special emphasis on mathematical models. A great deal of testimony was also devoted to the manipulation of several years of Pickwick's employment data to obtain both "chi-square"and "standard deviation" comparisons of the average age of Pickwick's work force with the national labor force. This portion of the trial was particularly complex and detailed and of the type not readily comprehended by laymen.

Not only was the trial unusual because of the complexity of the facts and issues in litigation, as well as the expert statistics testimony, but also because of Petitioner's flagrant attempts to manipulate jury sympathy in his favor and against Pickwick. Early on in the trial Petitioner was permitted to testify as to aspects of his life which were not the slightest bit relevant to the issues and clearly intended solely to elicit jury sympathy. For example, Petitioner testified in detail about the hardships of growing up in Romania, his capture by the Nazis during World War II and life in a concentration camp. He testified that he was forced to dig graves for fellow prisoners, and that although he too had been scheduled for extermination, he managed to escape. The jury heard about his returning to post-war Romania and struggling to overcome official anti-Semitism and finally immigrating to the United States with a wife and daughter, unable to speak English and without a job. It was clear that this evidence was offered only to touch the hearts of the jury and gain the jury's sympathy.

Near the end ot the trial Petitioner again sought the jury's sympathy while at the same time turning the jury against Pickwick by "proving" that David Irvin of Pickwick's Human Resources Department had lied. Irvin had testified that once he became aware consideration was being given to eliminating Petitioner's position, he double checked the decision and

started a company-wide search for another job for which Petitioner might be qualified. He later became aware of an operations analyst position and was going to tell Petitioner about it when he had to tell him his position was being eliminated. Irvin was adamant that he told Petitioner about the opportunity to interview, however, Petitioner was just as adamant that he did not.

After Irvin's testimony to "prove" that Irvin could not have told him, Petitioner, with no prior notice to Pickwick, took the stand and produced several photographs and long distance telephone bills which he testified showed he was on vacation the week Irvin claimed he told him of the analyst position, thus proving Pickwick's witness had lied. Everyone in the courtroom, particularly Pickwick's counsel, was dumbstruck by Petitioner's revelation as throughout the many months of discovery and production of documents, even though Petitioner had always maintained that Irvin had not told him of the interview, he had never disclosed any documents to support his denial. In his closing argument Petitioner's counsel made repeated reference to the vacation photographs and telephone bills and made numerous references to the "sham" job offer. This testimony had an obvious effect on the jury's sympathy for Petitioner and clearly turned the jury against Pickwick.

As adamant as Petitioner was at the first trial that he had been on vacation, at the commencement of the second trial when Petitioner took the stand as the very first witness, having been made aware that Pickwick had checked his payroll records, he *recanted* and admitted that the testimony which he had been so sure of at the first trial was wrong — that he was indeed at work that week and that he had been mistaken about the photos and the telephone bills. Unfortunately the first jury never got to hear this admission because it had long since rendered its verdict.

REASONS FOR DENYING THE WRIT

QUESTION I

Petitioner asserts there is a split among the circuits on the standard for granting a new trial based on the weight of the evidence when the subject matter in litigation is "simple" and the trial court disagrees with the jury's assessment of the "credibility of witnesses", i.e. in some circuits it is an abuse of discretion to grant a new trial in such circumstances while in others it is not.

Petitioner's argument is flawed in that the Eighth Circuit has essentially recognized the new trial standard which Petitioner would have this Court adopt and thus any split among the circuits would have no effect on this case. Additionally, even if there is split, the split has no bearing here because (1) the subject matter of this litigation was not "simple" and the issues were not the type which depended on the "credibility" of the witnesses and (2) there was no indication that the court's assessment of the credibility of the witnesses played any role in granting a new trial.

A. The alleged split in the standard to be used in awarding a new trial on the weight of the evidence is irrelevant as the Eighth Circuit has essentially recognized the standard recommended by Petitioner.

Petitioner has claimed that in those circuits which have adopted *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960), cert. denied 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2nd 60 (1960), it is an abuse of discretion to award a new trial on the weight of the evidence "where the subject matter of the litigation is simple" and "the determination of the issues depends upon the veracity of the witnesses". (Pet. 13, 14)

Petitioner has cited several Eighth Circuit cases to

demonstrate that a trial court may weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict, contrary to the *Lind* standard. (Pet. 17). What Petitioner has overlooked, however, is that in *Fireman's Fund Insurance Co. v. AALCO Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972), cert. denied, 410 U.S. 930, 93 S.Ct. 1371, 35 L.Ed.2d 592 (1973), the Eighth Circuit specifically referred to *Lind* and acknowledged that if the subject matter of the litigation is simple the trial court should be reluctant to grant a new trial and that the appellate court should exercise a closer degree of scrutiny and supervision to protect the litigant's right to a jury trial. *Fireman's Fund Insurance Co.*, 466 F2d at 187. This is exactly what *Lind* stands for.

Additionally, in *McGee v. South Pemiscot School Dist. R-V,* 712 F.2d 339 (8th Cir. 1983), the Eighth Circuit not only reiterated that the trial court should be "particularly reluctant to grant a new trial" where the subject matter of litigation is simple but also noted that "[t]he *jury* weighs the evidence and credibility of the witnesses." *McGee,* 712 F.2d at 344. (Emphasis added.) It is thus clear that in the Eighth Circuit if the subject matter of the litigation is "simple" the trial court should be particularly reluctant to grant a new trial and it is the jury's province to weigh the evidence and the credibility of the witnesses. This appears to be the new trial standard Petitioner would have this Court adopt on certiorari.

While it is true that in other Eighth Circuit cases the trial court has been permitted to weigh the evidence and disbelieve the witnesses, *Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir. 1984) and *Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 673 (8th Cir. 1985), in these cases there was no statement regarding the subject matter of the litigation. Respondent submits that in the appropriate case the Eighth Circuit recognizes the new trial standard proposed by Petitioner and thus the split would have no bearing on the outcome of this case.

B. The alleged "split" has no bearing on this case because the subject matter of the litigation was not "simple" and the determination of the issues did not depend on the "credibility" of the witnesses.

Petitioner has claimed that in the circuits which have adopted *Lind*, it is an abuse of discretion to award a new trial on the weight of the evidence where the subject matter of the litigation is simple and the determination of the issues depends upon the veracity of the witnesses and cites the Second Circuit as rejecting the *Lind* analysis, thus creating a "split". *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1048 (2nd Cir. 1984).

Respondent submits that if such an alleged split exists it is not relevant here because the subject matter of this case was far from "simple" and resolution of the issues depended upon much more than just the "veracity of the witnesses".

A review of *Lind* and some of the cases cited by Petitioner demonstrates the type of "simple" case to which the *Lind* standard should apply. In *Lind* itself, for example, plaintiff merely sued for unpaid commissions and moving expenses and the issues came down to the terms of the commission program, with some witnesses testifying in favor of plaintiff and some against. The trial court awarded the defendant a new trial and the Third Circuit reversed the order as an abuse of discretion. The Court specifically noted that the subject matter in *Lind* was simple, easily comprehended by laymen and that the jury's main duty was to determine the veracity of the witnesses. *Lind*, 278 F.2d at 91. It also went on to state, however, that where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of juries, a different standard of review would apply. *Lind*, 278 F.2d at 90.

In *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978) the plaintiff claimed he was injured aboard ship and brought an action under the Jones Act, 46 U.S.C. §688. The evidence of injury was disputed and the trial court granted the

defendant a new trial. On appeal, the First Circuit cited *Lind* and instructed the trial court to reconsider the motion, although it could not say if either granting or denying a new trial would be an abuse of discretion. Injury cases, such as *Borras* are clearly the type which fall within the "simple" category and in which the credibility of the witnesses plays a key role.

In *Vander Zee v. Karabatsos*, 589 F.2d 723, (D.C.Cir. 1978), cert. denied 441 U.S. 962, 99 S.Ct. 2407, 60 L.Ed.2d 1066 (1979), the District of Columbia Circuit reversed an order granting a new trial in an oral contract case. This too was a case in which the issues were simple and the result largely dependent on the credibility of the witnesses. The *Lind* standard obviously applies to a case like this.

It is clear that the new trial standard upon which the split is allegedly based does not apply to this case. Here the trial dealt with not one but many complicated matters outside the ordinary knowledge of juries and did not involve just a simple issue as in the typical *Lind* case. Discovery in this case produced many thousands of pages of documents and deposition testimony and almost as many at trail. The jury was presented with expert testimony on statistics, labor, psychiatry and medicine as well as business and economic testimony on the problems of a national corporation going through tremendous financial setbacks, layoffs and finally a reorganization. To claim that this was "a case in which the issues were simple" (Petitioner's Argument I) is simply not accurate and at a minimum mischarcterizes the complexitity of this litigation. Petitioner's attempt to describe this case as "simple" is nothing more than an obvious attempt to fit within the *Lind* standard in hopes that the Court would consider certiorari. This attempt should be rejected.

C. The alleged split has no bearing on this case because the trial court did not substitute its judgement of the facts and credibility of the witnesses for that of the jury.

Petitioner asserts there is a split as to whether the trial court may substitute its judgement of the facts and credibility of the witnesses for that of the jury in ruling on a motion for a new trial. (Pet. 13).

Pickwick submits that even if such a split exists, it has no relevance here because the trial court did not consider the credibility of the witnesses or substitute its judgement of the facts in granting the new trial. More specifically, a review of the trial court's opinion, gives **no** hint that it ever considered the credibility of any of the witnesses or that it made any finding of fact. In his memorandum, Judge Devitt merely stated that he was free to weigh the evidence for himself and that because he had the definite and firm conviction that the jury had made a mistake, he was permitted to set aside the verdict to avoid a miscarriage of justice. He made no statement that he had substituted his judgement of the facts or the credibility of the witnesses for that of the jury. The trial court recignizing the overwhelming evidence of Pickwick's financial difficulties and David Irvin's efforts to double check the task force's recommendation and then find Petitioner another possition, in spite of the fact that other employees had been terminated by the room full, could only reach one conclusion — the weight of the evidence clearly showed that age played no role in Petitioners termination and that the jury verdict was plainly wrong.

QUESTION II

Petitioner asserts that this Court should require trial courts to provide an explanation when granting a new trial so that an appellate court can determine if there has been an abuse of discretion. (Pet. 23).

Respondent submits that although it was not required to do so, the trial court gave its reasons for granting a new trial i.e. it stated that the claim that Pickwick's personnel decisions were motivated by age discrimination was overwhelmed by the evidence.

Petitioner's assertion should also be rejected on policy grounds in that the courts have wisely recognized that motions for new trial based on the weight of the evidence are left to the discretion of the trial court, *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940), and to do otherwise would seriously interfere with the authority and power of a trial judge in the federal system. This court has noted that a trial judge in the federal system not only has the power to comment on the weight of the evidence and discretion to grant a new trial if the verdict appears to be against the weight of the evidence, *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525, 540, 78 S.Ct. 893, 902, 2 L.Ed. 2d 953 (1958), but that the judge is not even required to enter supporting findings of fact when granting a new-trial motion. *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d. 193 (1980), fn. 3. See Fed. Rule Civ. Proc. 52 (a).

Respondent submits that this Court has spoken on a trial court's discretion to grant a new trial and that the decision should be left to the experience of the trial judge and his first hand observations in the courtroom.

CONCLUSION

For the reasons cited above, the petition for writ of certiorari should be denied.

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